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No. 2903

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN GILL, for whom has been substituted Maurice McMicken, Administrator with the will annexed of John Gill, deceased,

Plaintiff in Error.

vs.

FRANK WATERHOUSE,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

REPLY BRIEF

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The privilege of filing a reply brief will be exercised only so far as relates to the propositions or contentions made in the answering brief of defendant in error which have not been fully covered by our original brief.

I.

Acceptance of Guaranty.

It is contended that an acceptance of the guaranty in issue by The Commercial Bank of Scotland, Limited, and notice thereof to the guarantor was essential to make it a binding and enforceable contract. We concede the rule to be well settled in the Supreme Court of the United States that in case of offers of guaranty or conditional guaranties, delivery and acceptance by the guarantee and notice thereof to the guarantor are essential to constitute a valid and binding contract between guarantor and guarantee, the rule being based upon the theory that without the observance of these conditions the transaction lacks the essential requisites of a contract. This is not the rule, however, in respect to guaranties which in terms are absolute and unconditional, since they imply knowledge and intention on the part of the guarantor that they will be accepted and acted upon by the guarantee. Not only is this generally recognized by the courts, but it is likewise especially so recognized by the Supreme Court of the United States.

> *Davis v. Wells,* 104 U. S. 159, 169.
> *United States Fidelity Co. v. Riefler,* 239 U. S. 17, 25.

In *Davis v. Wells* (*supra*), the guaranty was very similar to the one here in issue, except that it recited a consideration of one dollar, running from the guarantee to the guarantor. In that case there was

an unconditional guaranty of any indebtedness of Gordon & Co. to Wells, Fargo & Co. not exceeding $10,000, on any overdrafts then made or thereafter to be made; and it was provided that the guaranty should continue until revoked by the guarantors in writing. After a discussion of the effect of the recital in the instrument of a consideration, the Court proceeds to consider the other language of the guaranty, and says:

"The obligation becomes thereby absolute and unqualified; free from all conditions whatever. This is the natural, obvious, and ordinary meaning of the terms employed, and we cannot doubt that they express the real meaning of the parties. It was their manifest intention to make it unambiguous that Wells, Fargo & Co., for any indebtedness that might arise to them in consequence of overdrafts by Gordon & Co., might securely look to the guarantors without the performance on their part of any conditions precedent thereto whatever.

It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of the surety, it is to be construed as a mercantile instrument in furtherance of its spirit and liberally, to promote the use and convenience of commercial intercourse."

In *United States Fidelity Co. v. Riefler* (*supra*), Mr. Justice Holmes, speaking for the Court, says:

"The bond on its face contemplated that the Company would accept it and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee and in fact is accepted by it, notice is not necessary that a condition subsequent to the

delivery by which the obligee might have made it ineffectual has not been fulfilled. The contract is complete without the notice [citing certain English cases], and we see no commercial reason why the principles ordinarily governing contracts under seal should not be applied."

If any significance is to be attached to the reference of the Court in the above case to the fact that the contract was sealed, this Court will take notice that seals have been now generally abolished. This is true in the State of Washington, where the statute provides:

"The use of private seals upon all deeds, mortgages, leases, bonds, and other instruments, and contracts in writing, is hereby abolished, and the addition of a private seal to any such instrument or contract in writing hereafter made, shall not affect its validity or legality in any respect." (R. & B. Code, §8751.)

It was long ago held by the Supreme Court of the United States that, where by the law of the forum seals were abolished, a contract under seal was not to be distinguished from one without.

Wilcox v. Hunt, 13 Pet. 378.

The guaranty here involved was absolute and unconditional in its terms, and not a mere guaranty of collection or an offer to guarantee. It is addressed to The Commercial Bank of Scotland, Limited, and declares: "I, Frank Waterhouse, * * * hereby guarantee you payment of all sums for which Frank Waterhouse, Limited, * * * are or may be liable to you." It further declares: "(1) That you shall be entitled to require from me whenever you

think fit, a payment or payments to account of my liability; (2) that you may grant to the said Frank Waterhouse, Limited, * * * time or other indulgence * * *; (3) that I shall not be entitled to rank on the estate of the said Frank Waterhouse, Limited, in respect to any payment or payments to account as aforesaid, * * * until your whole claims against them are satisfied; (4) that this guarantee is a continuing obligation and can be recalled by me only by writing and shall remain in force notwithstanding my death until recalled in writing." It was made in the light of an existing relation between bank and customer, and to secure a continuance of that relationship and an extension of credit. It was, moreover, made by an officer of a corporation on behalf of the corporation which bore his name, and with whose banking relations and credit he must be presumed to have had knowledge.

Even if acceptance and notice thereof were requisite, it will be observed that Frank Waterhouse executed this guaranty of the present and future indebtedness of Frank Waterhouse, Limited, to the Bank with which it was then doing business, in the presence of the Manager and the Accountant of the Bank itself; that the instrument of guaranty remained in the hands of the Bank until assigned and delivered to John Gill, now deceased, original plaintiff herein; and that the Bank in fact granted further credit and indulgence as contemplated by the guaranty. Moreover, defendant in error alleges in his sixth affirmative defense (Record, p. 13):

"That at the time of the execution and delivery of said letter of guaranty set forth in paragraph numbered V of said amended complaint, other letters of guaranty of like import and of the same tenor and substance were executed and delivered to said The Commercial Bank of Scotland, Limited * * * and were based upon the same consideration and were each delivered to said The Commercial Bank of Scotland, Limited, simultaneously with the delivery of the letter of guaranty of this defendant, and that the execution and delivery of said letters of guaranty by the above-named parties, and by this defendant, were parts of one and the same transaction, and to secure the same indebtedness alleged in said amended complaint, and were accepted by said The Commercial Bank of Scotland, Limited, at one and the same time as such security."

II.

Payment.

It is contended in the brief of defendant in error that the District Court was right in holding that the evidence in the case conclusively established payment by John Gill of the debt of Frank Waterhouse, Limited.

Let us concede at the threshold of this inquiry that where payment of an indebtedness is made by a stranger thereto, without any convention between him and the debtor or between him and the creditor that he is to take over and hold the obligation as an enforceable demand against the debtor, his act will constitute payment. The question here is whether there was a convention, a meeting of minds, between John Gill and the creditor bank that the payment

by Gill was a purchase, and not an extinguishment of the debt. What, therefore, are the facts?

(1) The following was shown in the testimony of James Gill, without objection:

"The bank were desirous that the debt due by Frank Waterhouse, Ltd., should be repaid and Mr. Alexander McNab, who was one of the guarantors and who was not * * * in a position to meet the guarantee if it were enforced against him, approached the late John Gill as a friend and asked him to *take over* the debt; that the late John Gill agreed to do so, and paid off the debt * * * and obtained the assignation * * * in consideration of said payment by him to the Bank." (Record, p. 26.)

The fact that he agreed to "take over" the debt certainly does not imply an intention on his part to satisfy and discharge it.

(2) William Bamford Lang, the Accountant of the Bank, testified that the advances to Frank Waterhouse, Limited, were made by the Bank on four letters of guaranty, including the one in suit (Record, p. 45); and James Lawson Anderson, Secretary of the Bank, testified that *on payment being made by John Gill, these guaranties were sent to him;* and also testified that the payment "was made to the Bank by the said John Gill in exchange for the assignation in his favor." (Record, p. 32.)

This clearly evidences that the Bank did not understand the transaction to be one of payment and discharge of the debt, else it would not have delivered the guaranties to Mr. Gill, but would instead have given an acknowledgment of payment and have returned the guaranties to the parties from whom it

had received them. Neither an irregular course of business nor bad faith can be presumed on the part of the Bank.

(3) The subsequent written assignment of the guaranty in suit, unless made in pursuance of the mutual understanding of the parties at the time of the payment by Gill to the Bank, would be out of the usual course of banking transactions, if not a positive act of fraud; and neither can be presumed.

If the transaction was a purchase, the guaranties followed the debt, and the mere delivery was sufficient to authorize the holder to sue thereon in the courts of Great Britain.

In re Hallet & Co., (1894) 2 Q. B. 258.

See also:

Page on Contracts, §1268.
Wooley v. Moore, 38 Atl. 758 (N. J.).
Van Pelt v. Hurt, 25 S. E. 489 (Ga.).

The reasonable inference, the one which should be drawn by a jury, is that the subsequent formal written assignment was made solely in contemplation of a suit in a foreign country.

In the brief of defendant in error, in support of the contention that the transaction was one of payment, and not of purchase, reliance is placed upon a certain agreement executed in October, 1900, between Frank Waterhouse and Frank Waterhouse, Limited, which was admitted over the objection of plaintiff in error. The Bank was not a party to this agreement, and an examination of the instrument (Record, p. 126) will disclose that it has no

bearing upon the question here involved and that its admission in evidence was erroneous. Moreover, it does not appear that any of the essential covenants of the agreement were ever performed by the defendant in error or by the corporation which he was to create.

In support of the contention that the facts of this case constitute payment, defendant in error cites and relies on the following cases:

Penwell v. Flickinger, 129 Pac. 324 (Mont.).
Moran v. Abbey, 63 Calif. 56.
Day v. Humphrey, 79 Ill. 452.

The Montana and California cases were cited before the trial court and have been sufficiently distinguished in our original brief.

In the case of *Day v. Humphrey,* the facts are these: A note for $200.00 was given in July, 1870, to a National Bank by one Humphrey, as principal, and one Hinckley as surety. When the note became due, Humphrey applied to Day (plaintiff) to borrow $200.00 until the first of April following, for the purpose of taking up the note, and Day agreed to let him have the money. They met at the Bank, when plaintiff gave his check for $200.00 and Humphrey paid the interest due, and the cashier surrendered the note to them. Thereupon Humphrey proposed to give his note to plaintiff, payable on the first of April following, but plaintiff said the old note was good enough. It was then suggested that the Bank endorse the note, and it was thereupon returned to the cashier for that purpose and by him

endorsed without recourse. Humphrey subsequently became insolvent, and Day brought action in 1874 against him and the surety on the note. On these facts, the Court very properly said:

"The arrangement could not bind Hinckley, who was a mere security, and was not present, consenting to it. The $200 paid to the bank to take up the note, was, in fact, a loan by plaintiff to Humphrey, to be repaid on the first of the ensuing April. The conduct of the parties is inconsistent with any other theory of the case."

Comment on this case would appear to be unnecessary.

It should be further observed that upon this plea of payment of the debt of the principal the burden of proof in the trial court was upon the defendant. The plaintiff sued upon a formal written assignment of the defendant's guaranty and the cause of action arising against him thereunder. A prima facie case was made upon profert of the guaranty and assignment and proof of the debt of the principal. It surely cannot be held that upon the evidence introduced by the plaintiff alone, the defendant has sustained the burden of proving the payment of the debt so conclusively that the question must be withdrawn from the jury.

III.

The Statutes of Limitation.

It is contended by the defendant in error that even though the judgment of the trial court cannot be sustained upon the grounds assigned by that

court in support of its ruling, the judgment should nevertheless be affirmed because plaintiff's cause of action is barred by the statutes of limitation.

Statutes of limitation are always matters of defense and must be affirmatively pleaded. In the State of Washington they relate only to the right to sue and do not render a claim void after the period prescribed. Section 155 of Remington & Ballinger's Code provides that "actions can only be commenced within the periods herein prescribed after the cause of action shall have accrued, * * * but the objection that the action was not commenced within the time limited can only be taken by answer or demurrer"; and then follow the sections quoted in the brief of defendant in error.

Several such defenses were attempted to be interposed by the answer in this case. In the brief of defendant in error various questions thus presented are intermingled. We shall, however, so far as may be, consider them separately.

(1) The second and third affirmative defenses plead the three-year statute of limitations of the State of Washington. But as the cause of action herein is upon a written contract of guaranty, this plea may be disregarded.

(2) It is, however, urged in the brief of defendant in error "that the three-year statute applies to the principal debt and the principal debtor," and in this connection counsel discuss the subject of mutual accounts and of partial payments by the debtor. The only such defense attempted to be pleaded is

found in the so-called fifth affirmative defense, where it is alleged that the indebtedness of Frank Waterhouse, Limited, is upon open account, that the right of action of plaintiff and his assignor thereon "accrued more than three years before the commencement of this action," and that said debtor was "discharged and released from any liability therefor or thereupon by the bar of the statute of limitations." Thus it will be seen that the defendant in error has attempted to plead the three-year statute of limitation of the State of Washington to a mere right of action, one which has never been commenced within this State.

Both Frank Waterhouse, Limited, the principal debtor, and The Commercial Bank of Scotland, Limited, the original creditor, were at all times domiciled in Great Britain, as was also John Gill, the assignee. The cause of action arose there and was enforceable in the courts of that country and according to its laws.

By Section 178, R. & B. Code of Washington, it is provided:

"When the cause of action has arisen in another state, territory, or country between nonresidents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state."

If it were intended to allege as a defense herein that the claim was either void or unenforceable by the laws of Great Britain and in its courts, it would be necessary to plead the statute of limitations of

that country by its title and words or full substance, and to introduce proof thereof. For while in mere matters of administration, courts may presume the law of a foreign country to be the same as the law of the forum, when a substantive right either of action or defense is predicated upon a foreign statute, such statute must be pleaded and proven.

> *Lowry v. Moore,* 16 Wash. 476, 479.
> *Cuba R. R. Co. v. Crosby,* 222 U. S. 473, 479.
> *Thomas v. Grand Trunk Ry. Co.* (Del.), 42 Atl. 987.
> *Wharton on Conflict of Laws,* Vol. 2, pp. 1563, 1564.
> *Murphy v. Collins,* 121 Mass. 6.
> *Ellis v. Maxson,* 19 Mich. 186.
> *Liverpool Steam Co. v. Phenix Ins. Co.,* 129 U. S. 397, 445.

So likewise it would be necessary to allege and prove that the indebtedness had not been acknowledged by the debtor in writing or otherwise within the statute and that no action had been commenced against the debtor within the period prescribed by the statute. Both the requisite allegations and proofs are lacking in this case.

"There is no presumption of law from the mere fact that the time has elapsed which is fixed by the statute for the commencement of the action, that the cause of action is barred by the statute of limitations. The court will not presume facts as to which there is no evidence to relieve a party from the bar of the statute."

> 25 *Cyc.* p. 1423.

(3) But counsel for defendant in error, assuming, as a correct premise, that the cause of action

against the principal debtor was barred at the commencement of this action, contend that the right of action herein is, therefore, likewise barred. Even if the premise so assumed were correct, however, the conclusion is not well founded in law. The contention is based upon the following cases.

Spokane County v. Prescott, 19 Wash. 418, and other decisions of that court predicated thereon.
Mulvane v. Sedgley (Kans.), 64 Pac. 1038.
State v. Blake, 2 Ohio St. 147.
County of Sonoma v. Hall (Calif.), 62 Pac. 257.
United States v. Axman, 152 Fed. 816, 821, 822.

The latter case was decided upon the authority of the case of *County of Sonoma v. Hall* (*supra*).

All of these cases are based upon official and statutory bonds. They proceed upon the theory that the obligation was one arising by statute, and the written instrument being merely collateral, no new obligation is imposed or assumed by it.

In each of these States the rule is denied in respect to voluntary commercial guaranties of payment.

California:

Whiting v. Clark, 17 Calif. 407.
Sichel v. Carrillo, 42 Calif. 493.
Bull v. Coe, 77 Calif. 54.

Kansas:

Baker v. Skinner, 64 Pac. 981.

Ohio:

Camp v. Bostwick, 20 Ohio St. 337.
Dye v. Dye, 21 Ohio 86.

Washington:

Donneberg v. Oppenheimer, 15 Wash. 290.

That the bar of the statute against the principal debtor will not bar an action against the guarantor upon a written guaranty of payment, is held by the great weight of judicial authority.

Streeper v. Sewing Machine Co., 112 U. S. 676.
Nelson v. First Natl. Bank of Killingsley, 69 Fed. 798. (Opinion of Court of Appeals for Eighth Circuit by Sanborn, J.)
People v. White, 11 Ill. 348.
Seabury v. Sibley (Mass.), 66 N. E. 603.
Willis v. Chowning (Tex.), 59 Am. St. 842.
Hooper v. Hooper (Md.), 48 Am. St. 496.
Johnson v. Planters Bank (Miss.), 43 Am. Dec. 480.
Darby v. Berney Natl. Bank (Ala.), 11 So. 881.
Fales & Jenks Machine Co. v. Browning (S. C.), 46 S. E. 545.
Cowan v. Roberts (N. C.), 46 S. E. 979.
Rogers v. Chambers (Ga.), 37 S. E. 429.
Osborne & Co. v Gullikson (Minn.), 66 N. W. 965.
Davis v. Graham, 29 Iowa 514.
Goff v. Janeway (Ky.), 99 S. W. 602.
Hunt v. Bridgeham, 19 Mass. 582.
McKee v. Needles (Iowa), 98 N. W. 618.
State v. Murphy (Nev.), 48 Pac. 628.

The rule is thus stated in 20 Cyc. p 1486:

"The courts generally hold that the creditor may proceed against an absolute guarantor of payment even when his action is barred against the principal debtor."

1 Brandt on Suretyship and Guaranty, (3d Ed.) §§376, 508.

2 Randolph on Commercial Paper, (2d Ed.) §§924, 926.

"It is a rule of law that a creditor may suspend his right forever against the principal debtor, and yet preserve his rights against the surety."

Green v. Wynn, 38 L. J., Ch. 76; L. R. 7, Eq. 28; 19 L. T. 553; 17 W. R. 72; Affirmed, 38 L. J., Ch. 220; L. R. 4 Ch. 204; 20 L. T. 131; 17 W. R. 385.

The rule so recognized by the authorities is undoubtedly correct when applied to absolute and unconditional guaranties like the one here in issue. The obligation of such a guarantor is that of a surety.

Davis v. Wells, 104 U. S. 169.
Hooper v. Hooper, 81 Md. 155, 48 Am. St. 496.
Iron City Natl. Bank v. Rafferty, 56 Atl. 445.

In *Davis v. Wells* (*supra*) the Court, in speaking of such a guaranty, said that "the contract of guaranty is the obligation of a surety." The liability of the surety is immediate and direct. "He agrees that he will perform the principal contract, fixing upon himself the responsibility from the beginning." *(Stearns on Surety,* 2d Ed., §6*)*.

(4) The only remaining plea of the statutes of limitation to be considered is that pleaded in the fourth affirmative defense, which alleges "that the cause of action set forth in said amended complaint did not accrue within six years before the commencement of this action."

Notwithstanding this plea, counsel for defendant

in error assert, on page 38 of their brief, that the contention that the "case is ruled by the six-year statute * * * is an erroneous contention." We are at a loss to understand this position. The cause of action here involved is based upon a written contract of guaranty, and but for it, no liability herein would attach to the defendant in error. By the terms of the statute an action "upon a contract in writing, or liability, express or implied, arising out of a written agreement," must be commenced within six years after it accrues. It has even ben held by the Supreme Court of the State of Washington that because of the peculiar language of this statute, the action for contribution between co-sureties upon a promissory note is controlled by it.

Caldwell v. Hurley, 41 Wash. 296.
Lindblom v. Johnson, 92 Wash. 171.

It is urged in the brief of counsel for defendant in error that "by the express terms of the guaranty involved in this case, the money was payable by the guarantor upon demand." This statement, we think, is correct. The guaranty provided "that you shall be entitled to *require from me whenever you think fit* payment or payments to account of my liability." The instrument of guaranty contemplated a request or demand before payment would be exacted, and hence demand was doubtless a condition precedent to the right to sue.

First Natl. Bank of Waterloo v. Story (N. Y.), 93 N. E. 940, and cases cited.
Bolles v. Stearns, 65 Mass. 320.

Such a demand was alleged in the complaint in suit and was proven on the trial. (See Plaintiff's Exhibit "C," Record, p. 90).

But it is contended that because a demand was necessary, the right of action accrued thereon immediately upon the execution of the guaranty as to all previous advances and separate rights of action from the date of each subsequent advance. The cases of *Brooks v. Trustee Company,* 76 Wash., and *Douglass v. Reynolds,* 7 Peters, cited in support of this contention, are not in point. The case of *Douglass v. Reynolds* was an undertaking to be responsible to the guarantee only in case the debtor failed to pay. In other words, the liability was not that of a surety. In that case the Court properly said:

"All that could be required would be, that when all the transactions between the plaintiffs and Haring under the guarantee were closed, notice of the amount for which the guarantors were held responsible should, within a reasonable time afterwards, be communicated to them."

The rule applicable to promissory notes payable on demand, namely, that no demand is necessary before bringing action thereon, does not apply, as we have seen, to actions upon guaranties such as the one here involved. The rule is, we think, correctly stated in *First Natl. Bank of Waterloo v. Story* (*supra*), where it is said:

"(1). When the promise is to pay one's own debt for a specified amount on demand, no demand need be alleged or proved.

"(2). When the promise to pay on demand is not to pay one's own debt, but is a collateral promise

to pay the debt of another, a demand is necessary, for it is part of the cause of action."

It has, indeed, been frequently held, even in actions upon a promise to pay a certain sum of money on demand, that where the contract, construed by its terms and in the light of the situation of the parties and the objects and purposes in view, discloses a mutual intention that demand in fact be made, such demand is necessary before a cause of action accrues.

New England Fire Ins. Co. v. Haynes (Vt.), 45 Atl. 221, 76 Am. St. Rep. 771.
Stanton v. Stanton, 37 Vt. 413.
Jameson v. Jameson, 72 Mo. 640.
Daniels v. Daniels (Calif.), 85 Pac. 134.
Massie v. Byrd (Ala.), 6 So. 145.
Wood on Limitation of Actions, p. 256.

In determining, therefore, when the cause of action accrued, the Court must look to the terms of the contract, the situation of the parties, and the objects and purposes sought to be accomplished by the parties thereby. As is said in *Hooper v. Hooper* (*supra*):

"A guaranty is a mercantile instrument to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical accuracy, but in furtherance of its spirit and liberally to promote the use and convenience of commercial intercourse. It should be given that effect which will best accord with the intention of the parties as manifested by the terms of the guaranty, taken in connection with the subject matter to which it relates, and neither enlarging the words beyond their natural import in favor of the creditor, nor restricting them in aid of the

surety. The circumstances accompanying the whole transaction may be looked to in ascertaining the understanding of the parties."

In the light of these principles, what was the intention of the parties? Frank Waterhouse was a stockholder and officer of the corporation which bore his name. As said by the Supreme Court, in *Hawkins v. Glenn,* 131 U. S. 329:

"A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

The corporation was a customer of The Commercial Bank of Scotland, and upon the strength of the letters of guaranty of its officers it had secured credit for a very large sum. It was manifestly not prepared to pay this indebtedness consistently with the prosecution of its enterprises, and its officers desired indulgence and the privilege of further advances to it; otherwise, there would be no occasion for the execution of the guaranty. The instrument not only authorized such indulgence, but provided that it might be given without consulting Waterhouse and without affecting his obligation thereunder. It likewise provided that the guaranty was a continuing obligation and one that could be recalled by him only in writing.

Further advances were made and time and indulgence in fact granted, and the relationship contemplated by the written guaranty continued until the closing of the accounts on the 31st of October, 1903.

By the terms of the contract, either party could bring it to an end, or in other words, could commence the tolling of the statute of limitations. This could be done by the guarantor, by giving the stipulated notice in writing; or by the guarantee, by refusing to make further advances and to grant further indulgence. No such notice was given by the defendant in error. The Bank, however, by closing its accounts with the debtor, may be said to have terminated the further function of the contract. At that time it might proceed to collect the indebtedness, upon making demand upon the guarantor. It is immaterial in this case whether the statute began to run against defendant in error from the date of the demand or from the date when the transactions were closed, to-wit, October 31, 1903; that it did not commence to run at an earlier date clearly follows from a proper interpretation of the agreement of the parties.

Jones v. Trimble (Penna.), 3 Rawles 381.
Bank v. Knotts (S. C.), 70 Am. Dec. 234.
Hooker v. Gooding, 86 Ill. 61.
Goff v. Janeway (Ky.), 99 S. W. 602.
City Natl Bank v. Phelps, 86 N. Y. 484.
Daniels v. Daniels, 85 Pac. 134.
Stanton v. Stanton, 37 Vt. 413.

IV.

Proof of Debt.

An elaborate argument is made in the brief of defendant in error in support of the contention that the proof of debt was insufficient to carry the

case to the jury. The proof is undisputed that all advances were made by the Bank upon checks drawn by Frank Waterhouse, Limited, and signed by two directors and by the secretary. (Deposition of Lang, Record, p. 43.)

Counsel state in their brief that "none of these checks were produced at the trial or before the commissioner taking the depositions"; overlooking the fact that the checks drawn on the loan account accompanied one of the suppressed depositions. As to the other checks, McEwen, the secretary of the corporation, testified:

"I have not in my possession the cheques drawn upon the loan account. I have the cheques which operated on the current or general account and No. 2 account, but as liquidator of the company I cannot part with them. I have compared them with the copy accounts marked A, B and C appended to the said deposition of Mr. George Sutherland Coutts, and they agree with the figures stated in that account."

And he adds:

"The advances made to Frank Waterhouse, Ltd., were made at the instance and request of the board of directors of the company." (Record, p. 36).

An elaborate argument is also made to show that the proof of accounts of the Bank was insufficient and the evidence thereof incompetent. It should be here remarked that while, as a matter of convenience in bookkeeping, the principal moneys advanced by the Bank to the corporation were charged to it in what is denominated "Loan Account," the items so advanced are all credited in the general or

checking account of the corporation on the dates thereof, and they therefore evidence but a single series of transactions. William Bamford Lang, who was the accountant of the London Bank at the time of these transactions and who made out and certified to the accounts in evidence attached to the assignation, testified:

> "I have examined the accounts attached to the said assignation by the Commercial Bank of Scotland, Ltd., in favor of the said John Gill, and they are full copies of the accounts of Frank Waterhouse, Ltd., taken from the books of the bank. They are certified correct by me, and the books from which they were taken were the ordinary books of the bank kept in the regular course of the bank's business and they were in the custody and control of the bank." (Record, p. 42).

This evidence is competent and sufficient under the stipulatlon upon which the depositions were taken.

But specific proof of an itemized account is not necessary to support this action. The obligation of the guarantor was to pay all sums for which the corporation is or may be liable to the Bank, with interest thereon from the date or dates of such liability, not exceeding £21,000. The creation and existence of the indebtedness was abundantly proved by the testimony. It was expressly admitted by the secretary of the company. A statement of the indebtedness of the corporation accompanied the demand on the defendant in error (Plaintiff's Exhibit "C", Record, p. 90), produced by him at the trial, and to it no objection was ever made by him.

In view of what was said in the original brief and at the oral argument, we deem it unnecessary to make any reply to that portion of defendant's brief devoted to the subject of hearsay evidence.

Respectfully submitted,

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